BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERESA HOLGUIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 177,018
EXCEL CORPORATION	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Kenneth S. Johnson on October 22, 1997. The Appeals Board heard oral argument on March 25, 1998.

APPEARANCES

Claimant appeared by her attorney, C. Albert Herdoiza of Kansas City, Kansas. The respondent, a qualified self-insured, appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Wendel W. Wurst of Garden City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and adopted the stipulations listed in the Award.

ISSUES

The sole issue on appeal is the nature and extent of claimant's disability. Under K.S.A. 44-510e, a claimant's permanent disability award is limited to no more than the percentage of functional impairment when the claimant earns a post-injury wage equal to 90 percent or more of his/her pre-injury wage. The ALJ found claimant refused

respondent's offer of employment at a wage comparable to her pre-injury wage. The ALJ therefore imputed the comparable wage to claimant and limited the award to functional impairment based on K.S.A. 1992 Supp. 44-510e, as construed in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Claimant contends the offered employment was not work claimant could perform within the recommended medical restrictions and the wage in that employment should not, for that reason, be imputed to claimant. Claimant asks the Board to grant a higher work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments made by the parties, the Appeals Board concludes the Award should be affirmed.

FINDINGS OF FACT

(1) The parties have stipulated claimant suffered a compensable injury in her employment for respondent on February 2, 1993, and that as a result claimant has a functional impairment of 16 percent.

(2) Claimant began working for respondent in December 1989 and for two years worked the second shift in a trimming position requiring the use of a knife and hook. Claimant then moved to the first shift and was working the first shift at the time of her injury.

(3) On February 2, 1993, the stipulated date of accident, claimant injured both shoulders, arms, wrists, and elbows as the result of her work on the trim job she was doing for respondent. Respondent provided medical treatment through Dr. J. Mark Melhorn. Dr. Melhorn performed surgery for de Quervain's on the right wrist June 1, 1994, and for a torn rotator cuff on the right shoulder June 29, 1994. In September of 1994, Dr. Melhorn rated claimant's impairment as a 12 percent to the whole body consisting of impairment to both upper extremities. He recommended the following restrictions:

> Light medium work pattern defined by OSHA as 35 lbs maximum lift/carry, frequent 20 lbs, with repetitive tasks of grasping, pushing/pulling, fine manipulation 4-6 hours per 8 hour workday, no hands over shoulders, and no hooks, knives or scissors.

(4) Claimant's injuries were evaluated by Edward J. Prostic, M.D., on January 11, 1995. He concluded claimant has a 20 percent impairment to the body as a whole. He agreed with the restrictions recommended by Dr. Melhorn. Dr. Prostic testified he did not have detailed information about the job claimant was doing, a job Dr. Prostic understood as a fat separation job, but felt the job was appropriate for claimant's restrictions based on what he knew of the job.

(5) After Dr. Melhorn released claimant, respondent gave her a tour of the plant for the purpose of identifying a job she could do within the recommended medical restrictions. Mr. George Parish testified, and the Board finds, claimant identified the "low temp belt" job as one she could do. Respondent also sent a video tape showing several jobs, one of which was the "low temp belt" job, to Dr. Melhorn who issued a report giving his opinion on whether claimant could or could not perform each of the jobs shown on the tape. As to the

"low temp belt" job, Dr. Melhorn stated: "It would appear that in general this would fall within the guides provided."

(6) The "low temp belt" job involved standing at a conveyor belt and sorting pieces of meat and fat as they came by. Some pieces were placed on a second belt immediately in front of the belt on which she was working, other pieces were tossed just beyond that second belt.

(7) Respondent offered claimant the "low temp belt" job but, because of seniority considerations, was able to offer a job only on the second shift. Claimant had been working on the first shift at the time of the injury. The "low temp belt" job paid the same, or approximately the same, wage claimant was earning at the time of the injury.

(8) Claimant refused the "low temp belt" job. She admitted she would have done the job if it had been on the first shift. Claimant cited family reasons for not wanting to work on the second shift.

(9) The Board finds the "low temp belt" job was a job claimant was capable of performing. While the facts make this a close question in this case, the Board is persuaded by several factors. Claimant was performing the "low temp belt" job on a light-duty basis at the time it was offered on a full-time basis. Claimant was having some problems doing the job, but with knowledge of what the job entailed, testified she would have taken the position had it been offered on the first shift. In addition, Dr. Melhorn concluded that in general the job fell within the guides he recommended. Claimant has not provided evidence which convincingly contradicts this general conclusion.

CONCLUSIONS OF LAW

(1) The law applicable to injuries on the date of claimant's injury defines work disability as the percentage loss of ability to perform work in the open labor market and earn comparable wages. K.S.A. 1992 Supp. 44-510e.

(2) The relevant statutes also provide that a claimant who engages in work for a wage comparable to his/her pre-injury wage is presumed to have no work disability. Unless the presumption is overcome, the disability is considered to be no higher than the functional impairment. K.S.A. 1992 Supp. 44-510e.

(3) A claimant who refused to even attempt a comparable wage job is also limited to benefits based on the extent of the functional impairment and is not entitled to a higher work disability. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

(4) Because claimant declined the offer of employment at a comparable wage, employment she was capable of performing, the comparable wage is imputed to claimant and the award is limited to functional impairment. K.S.A. 1992 Supp. 44-510e. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth S. Johnson, dated October 22, 1997, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Teresa Holguin, and against the respondent, Excel Corporation, a qualified self-insured, and the Kansas Workers Compensation Fund, for an accidental injury which occurred February 2, 1993, and based upon an average weekly wage of $396.86, for 25 weeks of temporary total disability compensation at the rate of $264.59 per week or $6,614.75, followed by 390 weeks at the rate of $42.34 per week or $16,512.60 for a 16% permanent partial general disability, making a total award of $23,127.35.

As of April 30, 1998, there is due and owing claimant 25 weeks of temporary total disability compensation at the rate of $264.59 per week or $6,614.75, followed by 248.29 weeks of permanent partial general disability compensation at the rate of $42.34 per week in the sum of $10,512.60, for a total of $17,127.35 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $6,000.00 is to be paid for 141.71 weeks at the rate of $42.34 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders made in the Award.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
D. Shane Bangerter, Dodge City, KS
Wendel W. Wurst, Garden City, KS
Office of the Administrative Law Judge, Garden City, KS
Philip S. Harness, Director